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v.

KOW NGO

HIGH COURT MALAYA, SEREMBAN
AHMAD NASFY YASIN JC
[CRIMINAL APPEAL NO: 42-12-2008]
17 DECEMBER 2009

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CRIMINAL LAW: *Penal Code - Section 326 - Voluntarily causing grievous hurt - Throwing acid on a person - Appeal against inadequacy of sentence - Plea of guilt - Mitigating factors - Whether sentence manifestly inappropriate and inadequate*

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CRIMINAL PROCEDURE: *Sentence - Inadequacy of sentence - Appeal against - Offence of throwing acid on a person - Plea of guilt - Mitigating factors - Whether sentence manifestly inappropriate and inadequate - Penal Code, s. 326*

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This was an appeal by the Deputy Public Prosecutor against the sessions judge's decision sentencing the accused to a fine amounting to RM1,500 and one-day imprisonment for voluntarily causing grievous hurt to a person by throwing acid on said person, an offence punishable under s. 326 of the Penal Code. The sessions judge took into account the accused's plea of guilt and various mitigating factors, including old age and poor health, in reaching her decision. Hence, the present appeal against the inadequacy of the sentence.

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Held (allowing the appeal):

- (1) The sessions judge failed to comprehend the severity of the offence and the demands of public interest. The guilty plea did not automatically entitle the accused to a lesser punishment. Further, old age and poor health alone cannot be a barrier or mitigating factor for one to go around committing crimes and getting away for the same reason. The act of throwing acid on a fellow human being, in this case a woman, attracts severe punishment as provided under the law and cannot be tolerated irrespective of the offender's age. Therefore, after considering the relevant facts and circumstances leading to them, it was

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A clear that the sentence passed by the sessions judge was manifestly inappropriate and inadequate, and called for intervention from the appellate court. (paras 17, 25, 26, 33 & 36)

B *[Sentence substituted with one of five years' imprisonment.]*

Case(s) referred to:

Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA (*refd*)

PP v. Loo Choon Fatt [1976] 1 LNS 102 CA (*refd*)

PP v. Ng Ah Tak [1958] 1 LNS 51 HC (*refd*)

C *PP v. Yap Huat Heng* [1986] 1 CLJ 81; [1986] CLJ (Rep) 645 HC (*refd*)

PP v. Yee Tham Soon [2000] 7 CLJ 519 HC (*refd*)

R v. Atkinson [1978] 2 All ER 460 (*refd*)

R v. Ball, 35 Cr App R 164 (*refd*)

Legislation referred to:

D Evidence Act 1950, s. 80

Penal Code, s. 326

*For the appellant - Wan Shaharuddin Wan Laden DPP; State Legal Adviser
Negeri Sembilan*

E *For the respondent - Siti Sakwa; M/s Krishna, Manian & Indran*

Watching brief for the victim's family - Maniam Nair

Reported by Suresh Nathan

F **JUDGMENT**

Ahmad Nasfy Yasin JC:

G [1] This is an appeal by the Deputy Public Prosecutor against sentence handed down by the learned Sessions Court Judge on 9 June 2008.

H [2] Kow Ngo @ Yew Loo Hing (hereinafter referred to as "the accused") was charged in the Sessions Court at Seremban on 2 August 2006 for an offence punishable under s. 326 of the Penal Code.

[3] The relevant charge reads as follows:

I Bahawa kamu pada 19/3/2006 jam lebih kurang 1220 tengah hari di kedai snooker Lot 60, Batu 8 Labu di dalam Daerah Seremban di dalam Negeri Sembilan, dengan sengaja menyebabkan cedera parah kepada seorang bernama Tan Sui Moi, KP 550905-05-5172

dengan menggunakan cecair asid iaitu satu cecair yang merbahaya kepada tubuh manusia. Oleh demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 326 Kanun keseksaan.

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[4] On 9 June 2008 the accused pleaded guilty to the charge and upon hearing his mitigation the learned Sessions Judge convicted him and passed a sentence of fine amounting to RM1,500 and one day imprisonment.

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[5] Hence the prosecutors appealed against the inadequate sentence.

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The Undisputed Facts Relevant To This Appeal

[6] The accused is a 62 years old man of Chinese origin. The victim in this case is a 50 years old lady of Chinese origin who runs a snooker outlet. On 19 March 2006 the accused went to the victim's outlet to meet her. Their conversation broke into a fight and latter the accused acted upon his anger by throwing acid on the victim's face.

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[7] The prosecution submitted the medical report which was marked as "P5". It is clear from the said report that the victim suffered 1st degree burn on her face, upper back and hand with total surface (BSA) 19%. Apart from this the victim was also certified to have contracted bilateral eye chemical injury as a result of the acid which was thrown on her.

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[8] The prosecution tendered the chemist report which was marked as "P6". The report confirmed that the liquid which was thrown on the victim was formic acid.

[9] The prosecution also tendered the previous criminal record of the accused which was marked as "P10".

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[10] The learned Sessions Judge in her grounds discussed in length the gravity of the offence committed and the serious repercussions it had on the victim. The learned Sessions Judge also discussed the socioeconomic back ground of the accused, the guilty plea given, the health condition and age as mitigating factors she had considered primarily in meting out the appropriate sentence.

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A The Guiding Principle Concerning Criminal Appeals

[11] The rule of the thumb is that the superior courts will not interfere with the sentence passed by the lower courts either on appeal or revision unless the sentence or order is manifestly inadequate or wrong in the scene of being unsuitable to the proven facts and circumstances.

[12] Having said of the above, it is my contention that the learned Sessions Court Judge is seemed to have excessively leaned towards the respondent and therefore failed to direct her mind in meting out the appropriate sentence.

[13] The courts in assessing the appropriate sentence should always be guided by the well established principle enunciated in the case of *R v. Ball*, 35 Cr App R 164 whereby Hilbury J said:

in deciding the appropriate sentence a court should always be guided by certain considerations, the first and foremost is the public interest. A proper sentence passed serves the public interest in two ways, it may deter others who might be tempted to try the crime and second, such sentence may induce the criminal to an honest living.

[14] The correct approach is to strike a balance so far as possible, between the interest of the public and the interest of the accused.

[15] Bearing the above in mind, the Court of Appeal in the case of *PP v. Loo Choon Fatt* [1976] 1 LNS 102 decided that the public interest far out weighted the mitigating factors, given the facts and the serious injuries inflicted.

Plea Of Guilt

[16] The learned Sessions Judge took into consideration the plea of guilt given by the accused and did mention that he is entitled for a reduced sentence for pleading guilty. On appeal the question before me is whether a plea of guilt is so great to accord the accused in this case for a lesser and lenient sentence.

[17] It is in my opinion that the Sessions Judge failed to comprehend the severity of the offence and demands of public interest which entails for a deterrent sentence. The guilty plea does not automatically entitle the convict to a lesser punishment. Refer to case of *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572.

[18] At this point I must say that the learned counsel for the respondent submitted before this Honourable Court that there was plea bargaining involved and the prosecutors had actually “left it to the court” to decide the sentence. A

[19] The issue before me today is whether there lies an implied meaning when one says “to leave it to the court”, hence the party saying it, is submitting himself to whatever decision made by the court without any qualification. B

[20] I had the opportunity to peruse the records of proceedings from the Sessions Court and found that there is not an iota of indication that there was in fact plea bargaining between parties. In absence of such record, I need only refer to s. 80 of the Evidence Act, which presumes that the records of evidence in a judicial proceeding were legally and correctly done. If counsel wishes to rebut this presumption then he must do so by the introduction of affidavit by himself or the court staff. C D

[21] Since there is no record of proceeding to show there was plea bargaining at the very onset, I shall answer the submission by the learned counsel for the respondent in negative. It is hereby stress here that if there was any form of plea bargaining between parties in private; it is not the business of this Honorable Court to dwell upon it. E

[22] I am of the opinion that the learned counsel for the respondent had taken the very true meaning of the prosecution’s submission out of context when they said “we leave it to the court”. In our country the prosecution is not heard on the sentence but after considering all the facts put on behalf and proven against or in favour of the accused. F G

[23] I quote with agreement the case of *R v. Atkinson* [1978] 2 All ER 460, whereby Lord Scarman clearly indicated that:

plea bargaining has no place in the English Criminal Law. It is found in the system of law in which the **prosecution are entitled to make submissions as to the character or length of the sentence**. In such system of law it is possible for a bargain to be driven between the **defence** and **prosecution** but not the **court itself**. H

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- A [24] Regardless of whether there was plea bargaining or not, it is my duty to draw the learned counsel's attention to the fact that at all times the accused was represented. The counsel who represents the accused in a criminal case must accord his client if not the best, sound advice. The counsel must not lead the accused blindly
B into pleading guilty unless he has committed the acts constituting the offence charged.

Old Age And Poor Health

- C [25] It is my opinion that old age and poor health reasons alone cannot be a barrier or mitigating factor for one to go around committing crimes and getting away for the same reason.

- D [26] Giving excuse of old age and poor health conditions in offences of serious nature will give rise to a dangerous precedent and send a wrong message to the would be offenders who fall under the criteria of "old age".

- E [27] I refer with full agreement to the *dicta* of VT Singham J in the case of *PP v. Yee Tham Soon* [2000] 7 CLJ 519, whereby His Lordship stressed that:

- F old age and not being in good health does not give license to a person to commit the cruel act as that which was committed by the respondent and later plead mercy using old age and health reasons as a strong mitigating factor for a lenient sentence and to escapes custodial sentence.

- G [28] In the case of *PP v. Yap Huat Heng* [1986] 1 CLJ 81; [1986] CLJ (Rep) 645, His Lordship Shaik Daud J opined that the aims of punishment or the gravity of the offence should be given priority rather than age.

Mode Of Committing The Offence

- H [29] The courts in the past have been always been stricter in meting out sentence in cases involving violence and brutality.

- I [30] Having said of the above, I must reiterate here that the victim was attacked with formic acid as described in the chemist report in exh. "P6". The use of acid here conforms to the definition of dangerous weapons as envisaged under s. 326 of the Penal Code.

[31] I am minded to agree with the case of *PP v. Ng Ah Tak* [1958] 1 LNS 51, whereby His Lordship Goode J highlighted that: A

of all the offences against the person, with the exception of murder,
I should think that causing hurt by acid throwing is the worst, and
the severest sentence is called for in all cases of acid throwing. B

[32] The appropriate sentence must be clear as to reflect the court's attitude which goes in tandem with the increase in crimes involving violence such as acid throwing.

[33] The act of throwing acid on a fellow human being and in this case a woman attracts severe punishment as provided under the law and cannot be tolerated by this court irrespective of the offender's age. Otherwise a mere fine of RM1,500 and one day imprisonment will make a mockery of the sentencing principles and will be wholly against public interest and might convey the wrong message to the public as a whole and the would be offenders will think they could get away with a light sentence such as a fine. C D

[34] The act committed by the respondent despite his old age is very inhumane and cowardly and this Honorable Court does not condone it. The court sympathizes with the pain and agony the victim had to undergo because of this inhumane act. E

[35] Everybody in this country is entitled to walk through the streets in peace and free from fear and anyone who infringes the rights of others and disturb that freedom should be severely dealt with by the courts when time is fixed for sentencing. F

[36] Therefore, after considering the relevant facts and circumstances leading to them, this court is of the view that the sentence passed by the learned Sessions Court Judge is manifestly inappropriate, inadequate and too lenient and therefore calls for intervention from the appellate court. G

[37] For the reasons adumbrated above the appeal from the learned Deputy Public Prosecutor is allowed. I feel the gravity of the offence in the present case would be sufficiently marked by a sentence of imprisonment of five years from today 20 October 2009 and I order the fine of RM1,500, in default four months imprisonment to be set aside and the fine paid to be refunded to the respondent. H

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